APPEAL BOARD/AGENCY SHOP DEVELOPMENTS -- 1999

PUBLIC EMPLOYMENT RELATIONS COMMISSION
APPEAL BOARD

Don Horowitz, Counsel

Supreme Court issues two agency shop decisions in 1998; their first rulings in many "moons"

The *Old Farmer's Almanac* is still a reference staple. One of its features is a calendar showing the dates on which a full moon will occur. Occasionally there will be two full moons in a given month. The second occurrence has been known, at least for the past 53 years, as a "blue" moon. The current edition shows that no blue moons occurred during all of 1997 and 1998, but in both January and March 1999, a second full moon appeared on the last day of each of those months. To confirm this assertion just access the ***Old*** *Farmer's Almanac* at its website (?!!):

rainorshine.com/ofa/heavenly.html

After public sector agency shops were held constitutional in *Abood v. Detroit Bd. of Ed.*, 431 *U.S.* 209 (1977), the Supreme Court, seemed to wait at least two years, i.e. once in a blue moon, before returning to this arcane area of constitutional and labor law. *See Ellis v. Railway Clerks,* 466 *U.S.* 435 (1984); *Chicago Teacher's Union v. Hudson,* 476 *U.S.* 292 (1986); *CWA v. Beck,* 487 *U.S.* 735 (1988); *Lehnert v. Ferris Faculty Association,* 500 *U.S.* 507 (1991).

Perhaps influenced by the upcoming year's unusual celestial events, in 1998, the Supreme Court heard full oral arguments and decided two agency shop cases: *Air Line Pilots Association v. Miller*, 523 *U.S.* 866 (1998); and *Marquez v. Screen Actors Guild,* ___ *U.S.*____ 119 *S. Ct.* 292, (1998). Both cases focused on jurisdiction and procedure rather than substance. *Miller*, a Railway Labor Act controversy, addressed whether nonmember pilots could initiate federal court litigation before exhausting the arbitration procedure established by ALPA in accordance with *Hudson*. The "blue moon" case, *Marquez,* examined the validity of standard union security clauses which track the text of the National Labor Relations Act, but which do not explicitly inform employees of their *Beck* rights. An adverse result could have presented private sector unions with the

headache of trying to rewrite or renegotiate contracts to explain that employees can be required to pay no more than their pro rata share of the costs of collective bargaining and contract administration. The Court did not mandate reformation of the clauses but instead held that union security clauses must be administered in a manner consistent with the "judicial gloss" which has been placed on 29 *U.S.C.A.* Section 158(a)(3).

The full moon's legendary tendency to trigger abnormal events and behavior may have had something to do with the unusual variety of decisions issued by state and other federal courts in the past year. Last year's crop of agency shop precedents was harvested from some unusual venues (e.g. Georgia and Puerto Rico) and tribunals (a municipal small claims court and an unemployment compensation proceeding).

U.S. Supreme Court

***Air Line Pilots Association v. Miller*, 523 *U.S.* 866 (1998)**

Hudson held that nonmembers who pay a service fee to a majority representative must have access to a procedure in which an impartial decision-maker rules on challenges to agency shop fees.

Nonmember pilots challenged their agency fee assessments in federal court, asserting they could not be compelled to arbitrate prior to commencing a civil rights action. A requested injunction against arbitration was denied by the district court and the arbitrator upheld the agency shop fee set by ALPA. The Court of Appeals, 108 *F*.3d 1415, reversed. The Supreme Court, in an opinion by Justice Ginsburg, held, that nonmembers cannot be required to first use an involuntary arbitration procedure before bringing their claims in a federal court. During oral argument Justice Ginsburg summed up the case in an exchange with the attorney for the nonmember pilots. Noting that *Hudson* had given nonmembers a convenient forum for their claims, she quipped "We gave you a forum but now you are saying 'Thanks, but no thanks.'"

***Marquez v. Screen Actors Guild*, ___ *U.S.*___ 119 *S. Ct.* 292, (1998).**

The collective bargaining agreement covering members of the Screen Actors Guild (SAG) required membership after an actor or actress had worked for 30 days in the industry.

Marquez, an actress who had won a part in a soap opera pilot, was prevented from working because she had not paid her fee to SAG in advance, in accordance with industry practice. Her dues or her reduced agency shop fee would have been nearly the same as the amount she would have received for the part, about $500.00. She sued both SAG and the production company, contesting the application of the 30 day requirement and asserting that the CBA's union security language, which tracked the National Labor Relations Act, was misleading and therefore invalid on its face. Her suit asserted that SAG breached its duty of fair representation in negotiating and enforcing a flawed union security clause and by failing to notify her truthfully about her rights not to join the union and to pay a reduced fee covering only the costs of collective bargaining and contract administration. The Court's opinion, by Justice O'Connor, upheld the facial validity of the clause. The Court also held that the interpretation of the 30-day requirement was within the NLRB's primary jurisdiction and should not be decided by the courts.

***Office and Professional Employees International Union Local 12, v. Bloom and NLRB,* ___ *U.S.*____ , 119 *S.Ct.* 1023, (1999), vacating and remanding 153 *F.3d* 844 (8th Cir. 1998).**

***United Paperworkers v. Buzenius and NLRB,* ___ *U.S.*____ , 119 *S.Ct.* 442, (1998), vacating and remanding 124 *F.3d* 788 (6th Cir. 1997).**

In these cases, the Supreme Court, applying *Marquez,* issued orders vacating and remanding decisions of the Courts of Appeal which voided traditional union security clauses.

Private Sector

***Production Workers Union of Chicago and Vicinity, Local 707, v. NLRB,* 161 *F.3d* 1047 (7th Cir. 1998)**

The court finds that the union engaged in unfair practices by causing the employer to discharge three employees for non-payment of dues without informing them of their right, pursuant to *Beck* and *California Saw*, to object to expenditures unrelated to collective bargaining and contract administration. The court refused to allow the union to belatedly assert that it had no non-chargeable expenditures where that defense had not been raised before the Board. The employees had supported a dissident

group in a representation election won by the union. The contract contained a traditionally worded union security clause. The employees were reinstated with back pay and benefits.

***Fell v. Independent Association of Continental Pilots,* 26 *F. Supp.* 2d 1272 (D. Colo 1998)**.

Applying *Miller,* the Court held that nonmembers were not required to exhaust arbitration before bringing suit in federal court. The union's fee collection procedure was found constitutionally adequate, even with a 13-month delay in ruling upon an objection. The expenses of affiliating with another union and the costs of a union board meeting were found chargeable; one other issue involving the allocation of expenses for overhead was remanded.

***Bottle Beer Drivers, Beer and Soft Drink Bottlers and Allied Workers v. Dameron,* 159 *L.R.R.M.* 3084 (Ct. Apps. Ohio, 1st Dist. 1998).**

The union had filed an action in municipal court to collect $124.00 in unpaid dues from Dameron, who stopped paying dues during a strike. He resumed dues payments after the three-month strike ended. The municipal court accepted the employee's defense that the union violated its fair representation duty by failing to tell him that he had a right not to be a member of the union and could pay only "financial core" dues. The union did not seek Dameron's dismissal, but filed the small claims action for back dues. On appeal, the court remanded a claim that the union misrepresented Dameron's obligations concerning membership and/or whether it breached a duty imposed by federal law to inform employees of their *Beck* rights. A lengthy concurring opinion questions whether a state court has jurisdiction over an alleged breach of the duty of fair representation, but agrees that a state court could use estoppel to dismiss a suit for back dues, if the union's actions had violated federal law.

***Ayres v. Poythress,* ___ *Ga* ____, 1998 *WL* 663333 (1998)**.

An employee of a private contractor on Federal property was discharged for failing to pay dues. The contract required employees to either join or pay a fee to the union. Ayres objected to the payment of any fee that exceeded his pro-rata share according to *Beck.* In 1996, he filed an unfair labor practice challenging the amount of and the procedure used to calculate the compulsory

fee. The union rejected offers made by Ayres to pay back dues over an extended period and refused to accept current dues until he satisfied his back dues obligation. It then offered to allow Ayres four months to pay the back obligation if he would sign a union authorization card or agree to pay an amount equal to full dues. Ayres refused, was discharged, and was denied unemployment compensation. He appealed. Noting that Ayres could not be forced to sign a union card and had a right to pay reduced fees, the Georgia Supreme Court held that denying unemployment compensation violated state right to work and unemployment compensation laws. It opined that the discharge was unlawful because Ayres had engaged in conduct protected by the NLRA.

Public Sector

***Bromley v. Michigan Education Association-NEA*, 178 *F.R.D.* 148 (E.D. Mich. 1998).**

The district court allowed the plaintiffs to add their challenges to fees assessed in the years subsequent to their original lawsuit which challenged their 1991-1992 assessment. The court certified the plaintiffs to represent a class which included both nonmembers of any Michigan Education Association local or affiliate who, beginning with the fee assessed for 1991-1992, challenged the fee through the system established by the MEA and those who objected, but had not used the MEA procedure. In adding nonmembers who had not exhausted the internal procedures, the court cited the Court of Appeals ruling in *Miller*, later affirmed by the Supreme Court.

***Debont v. City of Poway*, ___ *F Supp.* 2d. ____, 158 *L.R.R.M.* 2754 (S.D. Cal. 1998).**

The city and a Teamsters local representing its employees entered into an eight year agreement. The union security clause provided that employees who were or became union members on or after the effective date of the agreement must "remain members and the City shall continue to deduct said dues during the period covered by" the agreement. The contract also provided that "[e]mployees may withdraw their membership and discontinue dues deduction during the month of May, to be effective in June following the expiration of the agreement." The contract was effective from July 1, 1993 through June 30, 2001. A member attempted to resign in 1997 and was told by the union that he could not. He wrote to the City withdrawing his authorization, but deductions from his

paycheck continued. The employee filed a 42 U.S.C. Section 1983 complaint. The Court, citing *Abood* and *Hudson*, granted the request for a preliminary injunction against enforcement of the challenged provision, holding it was likely that the provision would be found to violate first amendment rights and the state law allowing public employees to refrain from joining a union or participating in union activities.

***Nashua Teachers Union v. Nashua School District,* 142 *N.H*. 683, *707 A.2d* 448 (1998).**

The New Hampshire public employment relations statutes neither specifically authorize nor prohibit agency shop. An action brought by labor organizations representing teachers sought a declaration that agency shop clauses were negotiable and enforceable. The Court holds that negotiation of agency shop comes within the phrase "other terms and conditions of employment" in the law authorizing collective negotiations. It notes that a previous version of the statute which had provided that employees had the right, "without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity," (emphasis added) was replaced in 1975 with new legislation not containing the underlined phrase.

***EEOC v. Union Independiente De La Autoridad De Acueductos Y Alcantarillados De Puerto Rico (Uia)* 30 *F.Supp*. 2d 217 (D.P.R. 1998)**

A Seventh Day Adventist, citing religious grounds, refused to join the union representing public employees at the utility where he worked. The contract had a traditional union shop agreement, and he was terminated for non-payment of dues. He sued for reinstatement and relief from the requirement that he join the union. The Court held that the employer and the union could have reasonably accommodated his religious beliefs by allowing him to affirm (rather than swear) loyalty to the union, allowing him to miss union activities on the Sabbath and allowing him to be a nonmember. The Court held that a charitable contribution, in lieu of union dues, could be made by the employee.